

APPEAL NO. 031985
FILED SEPTEMBER 17, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 19, 2003, with the record closing on June 30, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first through the eighth quarters. The claimant appeals, contending that he is entitled to SIBs for the quarters in issue. The respondent (carrier) asserts that the hearing officer's decision is supported by sufficient evidence and that the claimant's appeal was not timely filed.

DECISION

Affirmed.

According to records of the Texas Workers' Compensation Commission (Commission), the hearing officer's decision was mailed to the claimant on July 7, 2003. The appeal states that the claimant received the hearing officer's decision on July 10, 2003. Not counting Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, the claimant had until July 31, 2003, to file his appeal. Section 410.202. The Commission received the claimant's appeal on July 29, 2003. The claimant's appeal was timely filed.

The claimant's attorney and the carrier's attorney appeared at the CCH. The claimant did not appear personally or by telephone. The hearing officer notes that the claimant did not respond to the 10-day show cause letter that was sent to the claimant.

The claimant sustained serious injuries to his left foot and right leg in a work-related accident on January 28, 1998. It was stipulated at the CCH that the claimant reached maximum medical improvement on February 3, 2000, with a 21% impairment rating (IR), and that the qualifying periods for the first through the eighth quarters ran from January 6, 2001, through January 3, 2003.

The claimant had the burden to prove that he was entitled to SIBs for the first through the eighth quarters. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in dispute is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the relevant qualifying periods. It is undisputed that the claimant did not work or look for work during the relevant qualifying periods. The claimant, through his attorney, contended that he had no ability to work in any capacity as a result of his compensable injury during the relevant qualifying periods. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any

capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), 3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer found that during the relevant qualifying periods, the claimant had an ability to work, he did not conduct any job searches, and he was not enrolled in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission or by a private provider. The hearing officer also found that during the relevant qualifying periods, the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The hearing officer concluded that the claimant is not entitled to SIBs for the first through the eighth quarters.

The claimant contends that he provided a sufficient narrative report from a doctor that he was unable to work. A review of the exhibits in evidence reflects that there is no narrative report from a doctor that specifically explains how the claimant's compensable injury caused a total inability to work during the relevant qualifying periods. The May 24, 2001, report of Dr. M, which is relied upon by the claimant as a narrative report of his inability to work, does provide physical examination findings and an IR, and it notes that the claimant has not returned to work since his injury. However, it does not provide Dr. M's opinion regarding the claimant's ability to work nor is it a narrative report that explains how the compensable injury causes a total inability to work.

The claimant notes that the January 1999 functional capacity evaluation (FCE), which concluded that he had some ability to work, preceded the two additional surgeries he had in late 1999 for his compensable injury. In evaluating the weight to be given to that FCE, the hearing officer could consider that the treating doctor's records reflect that several months prior to the start of the qualifying period for the first quarter, the claimant had completed the physical therapy that he undertook subsequent to the 1999 surgeries, and that the treating doctor's records reflected that the 1999 surgeries improved the claimant's condition.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision that the claimant is not entitled to SIBs for the first through the eighth quarters is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **BANKERS STANDARD INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge